

1
2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
5

6 LAMESHA ROBERTSON,

7 Plaintiff,

8 vs.

9 BANK OF AMERICA, NA,

10 Defendant.

Case No: C 10-3525 SBA

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AND
DENYING PLAINTIFF'S MOTION
FOR RULE 11 SANCTIONS**

Dkts. 15, 20

11
12 Plaintiff brings this pro se action against Defendant Bank of America, NA, alleging that
13 she was defrauded in connection with the refinancing of her home. This matter is presently
14 before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint under Federal Rule
15 of Civil Procedure 12(b)(6) (Dkt. 15) and Plaintiff's Motion for Rule 11 Sanctions (Dkt. 20).
16 Having read and considered the papers filed in connection with these matters and being fully
17 informed, the Court hereby GRANTS Defendant's Motion to Dismiss and DENIES Plaintiff's
18 Motion for Rule 11 Sanctions for the reasons set forth below. The Court, in its discretion, finds
19 these matters suitable for resolution without oral argument. See Fed.R.Civ.P. 78(b).

20 **I. BACKGROUND**

21 **A. FACTUAL BACKGROUND**

22 Plaintiff filed the instant action on August 11, 2010, challenging Defendant's
23 foreclosure action against her home located at 1215 Hollyburne Avenue, Menlo Park,
24 California. Plaintiff generally alleges that Defendant induced her to enter into a predatory loan
25 agreement, committed numerous acts of fraud, failed to make proper notices that would have
26 given her warning of Defendant's fraudulent practices, charged false fees to Plaintiff, and
27 initiated frivolous collection procedures against Plaintiff. Dkt. 1 at 1-2. Plaintiff further
28 alleges that her loan amount was \$438,750.00, but she fails to indicate the date of the loan

1 agreement or with what lending entity she entered that agreement. Id. at 4. She also fails to
2 allege any facts regarding the terms of the loan at issue or attach any relevant loan document.
3 The remainder of Plaintiff's factual allegations consist of criticisms of the mortgage lending
4 industry and general practices within that industry. See id. at 2-7; 20-22.

5 Plaintiff's Complaint alleges causes of action for: (1) breach of fiduciary duty; (2)
6 negligence/negligence per se; (3) common law fraud; (4) breach of the implied covenant of
7 good faith and fair dealing; (5) violation of the Truth in Lending Act ("TILA"); and (6)
8 intentional infliction of emotional distress. Id. at 25-30. Plaintiff's breach of fiduciary duty
9 and negligence claims are premised on Defendant's alleged failure to comply with unspecified
10 provisions of TILA, the Home Ownership Equity Protection Act ("HOEPA"), and the Real
11 Estate Settlement Procedures Act ("RESPA"). Id. at 25-26.

12 **B. PROCEDURAL BACKGROUND**

13 On August 11, 2010, Plaintiff filed an ex parte Motion for Restraining Order and an ex
14 parte Motion for Temporary Injunction to enjoin the non-judicial foreclosure sale of her home,
15 which was scheduled for August 27, 2010. On August 16, 2010, the Court denied Plaintiff's
16 motions. Dkt. 12. Now, Defendant moves, under Rule 12(b)(6), to dismiss each of Plaintiff's
17 causes of action. Dkt. 15. Plaintiff has filed an opposition to Defendant's motion, along with a
18 "Motion for Rule 11 Sanctions." Dkt. 20. The merits of the parties' motions are addressed
19 below.

20 **II. LEGAL STANDARD**

21 A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the
22 plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a
23 cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).
24 To survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief
25 that is plausible on its face." Id. The pleadings must "give the defendant fair notice of what ...
26 the claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93 (2007)
27 (internal quotation marks omitted). "[A] Plaintiffs' obligation to provide the 'grounds' of his
28 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of

1 the elements of a cause of action will not do.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544,
2 555 (2007).

3 When considering a motion to dismiss under Rule 12(b)(6), a court must take the
4 allegations as true and construe them in the light most favorable to plaintiff. Leatherman v.
5 Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993).

6 Where the plaintiff is pro se, the Court must liberally construe his pleadings. Balistreri, 901

7 F.2d at 699. However, “the tenet that a court must accept as true all of the allegations

8 contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the

9 elements of a cause of action, supported by mere conclusory statements, do not suffice.”

10 Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949-50 (2009). “While legal conclusions can

11 provide the complaint’s framework, they must be supported by factual allegations.” Id. at

12 1950. Those facts must be sufficient to push the claims “across the line from conceivable to

13 plausible[.]” Id. at 1951 (quoting Twombly, 550 U.S. at 557).

14 In deciding a Rule 12(b)(6) motion, the court “may generally consider only allegations

15 contained in the pleadings, exhibits attached to the complaint, and matters properly subject to

16 judicial notice[.]” Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage

17 Leasehold and Easement in the Cloverly Subterranean, Geological Formation, 524 F.3d 1090,

18 1096 (9th Cir. 2008). Also, documents whose contents are alleged in a complaint and whose

19 authenticity no party questions, but which are not physically attached to the pleading, may be

20 considered on a Rule 12(b)(6) motion. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)

(overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119, 1127 (9th Cir. 2002)); accord Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998).¹

If the complaint is dismissed, the plaintiff generally should be afforded leave to amend unless it is clear the complaint cannot be saved by amendment. Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

III. ANALYSIS

A. PLAINTIFF'S FIRST CLAIM FOR BREACH OF FIDUCIARY DUTY

In her breach of fiduciary duty claim, Plaintiff alleges that Defendant “owed petitioner a fiduciary duty of care with respect to the mortgage loan transactions and related title activities involving” the property, and Defendant breached that duty by failing to comply, in an unspecified manner, with TILA, HOEPA, and RESPA. Compl. at 25.

Defendant contends that Plaintiff has not alleged facts showing that Defendant owed her a fiduciary duty. “[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law.” City of Hope Nat. Med. Ctr. v. Genentech, Inc., 43 Cal.4th 375, 386 (2008) (internal quotations omitted). To satisfy the “knowingly undertake” requirement, Plaintiff must show that Defendant “entered into [the

¹ Along with its motion, Defendant has submitted a Request for Judicial Notice, asking the Court to take judicial notice of the following Exhibits: (A) complaint in Lance Keating v. BAC Home Loan Servicing, Case No. CV-10-6367 (U.S. Dist. Court, C. D. Cal.); (B) complaint in Gillam v. BAC Home Loans Servicing, LP, Case No. CV-10-1059 (U.S. Dist. Court, C. D. Cal.); (C) Adjustable Rate Note, Loan Number 17029, in the amount of \$438,750.00, related to property located at 1215 Hollyburne Avenue, Menlo Park, California, dated March 15, 2007, signed by Plaintiff; (D) Deed of Trust, Loan Number 17029, in the amount of \$438,750.00, related to property located at 1215 Hollyburne Avenue, Menlo Park, California, recorded on March 23, 2007 in the Official Records of San Mateo County, signed by Plaintiff; and (E) Notice of Default and Acceleration, dated July 9, 2007, mailed to Plaintiff. Dkt. 15. The Court may take judicial notice of facts that are a matter of public record, such as Exhibits A, B, and D. Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001). Also, as indicated, documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not attached to the pleading, such as Exhibits C and E, may be considered on a Rule 12(b)(6) motion. Branch, 14 F.3d at 456. Moreover, Plaintiff has not opposed Defendant’s request or disputed the authenticity of the Exhibits. Therefore, Defendant’s request (Dkt. 15) is GRANTED.

1 contractual relationship] with the view of acting primarily for the benefit of [Plaintiff]” and
2 “subordinat[ing] its interests to those of [Plaintiff].” Id.

3 Here, Plaintiff fails to allege any facts describing her relationship with Defendant.
4 Specifically, she fails to allege that Defendant is the originating lender of her loan, or that
5 Defendant is the servicer of her loan transaction. Indeed, she does not allege the role, if any,
6 that Defendant played in connection with her loan. Moreover, the Deed of Trust for Plaintiff’s
7 property indentifies Zone Funding as the originating lender, Financial Title Company as
8 trustee, and Mortgage Electronic Registration Systems, Inc. as beneficiary. RJN Ex. D. Lastly,
9 the July 9, 2007 Notice of Default and Acceleration was sent to Plaintiff by Countrywide
10 Home Loans Servicing, LP, which identified itself as the servicer of her loan, and Plaintiff
11 makes no allegation in her Complaint that Defendant later assumed servicing of her loan. Id.
12 Ex. E. As such, Plaintiff has not alleged a relationship with Defendant giving rise to a
13 fiduciary duty. Of note, Plaintiff has not offered any argument to the contrary in her
14 opposition. Therefore, Defendant’s motion to dismiss Plaintiff’s first claim for breach of
15 fiduciary duty is GRANTED, and Plaintiff is granted leave to cure the above-stated
16 deficiencies.²

17 **B. PLAINTIFF’S SECOND CLAIM FOR NEGLIGENCE/NEGLIGENCE PER SE**

18 In her negligence/negligence per se claim, Plaintiff asserts that Defendant “owed a
19 general duty of care with respect to [Plaintiff], particularly concerning their duty to properly
20 perform due diligence as to the loans and related transactional issues ...,” and that Defendant

21 ² As an alternative matter, Defendant argues that Plaintiff’s breach of fiduciary duty
22 claim is barred by the applicable three-year statute of limitations. In particular, Defendant
23 asserts that Plaintiff’s claim is premised on Defendant’s alleged failure to disclose information
24 in connection with her loan transaction. It follows, according to Defendant, that any breach
25 must have occurred prior to the closing of Plaintiff’s loan, on March 15, 2007, which is more
26 than three years before Plaintiff filed suit. Defendant makes similar statute of limitations
27 arguments in moving to dismiss Plaintiff’s negligence and fraud claims. As explained herein,
28 the Court grants Defendant’s motion to dismiss these claims largely because Plaintiff has not
sufficiently pled Defendant’s breach of duty or its fraudulent conduct. Given that Plaintiff is
granted leave to amend these claims, and could allege in her amended complaint conduct that
occurred within the limitations period, the Court will not address the merits of Defendant’s
statute of limitations arguments at this time. Should Plaintiff chose to amend, Defendant is free
to reassert these arguments in view of the allegations in the amended complaint.

1 owed a duty of care under TILA , HOEPA, and RESPA to “provide proper disclosures
2 concerning the terms and conditions of the loans they marketed, to refrain from marketing
3 loans they knew or should have known that borrowers could not afford or maintain, and to
4 avoid paying undue compensation ... to mortgage Agents and loan officers.” Compl. at 26.³
5 Plaintiff further alleges that Defendant knew or should have known that “the loan transactions
6 involving [Plaintiff] ... were defective, unlawful, violative of federal and state laws and
7 regulations” Id.

8 Negligence requires a plaintiff to allege “(1) a legal duty to use reasonable care; (2)
9 breach of that duty, and (3) proximate [or legal] cause between the breach and (4) resulting
10 injury.” Castaneda v. Saxon Mortgage Services, 2009 WL 4640673, at *4 (E.D. Cal. Dec. 3,
11 2009). In this case, Defendant argues that Plaintiff’s claim fails because she has not alleged
12 facts showing that Defendant owed her a duty of care.

13 “[A]s a general rule, a financial institution owes no duty of care to a borrower when the
14 institution’s involvement in the loan transaction does not exceed the scope of its conventional
15 role as a mere lender of money.” Nymark v. Heart Fed. Savings & Loan Assn., 231
16 Cal.App.3d 1089, 1096 (1991). The same holds true for the servicing entity and the
17 beneficiary of Plaintiff’s loan. See Castaneda v. Saxon Mortg. Services, Inc., 687 F. Supp. 2d
18 1191, 1198 (E.D. Cal. 2009) (dismissing negligence claim against lender, nominal beneficiary,
19 and loan servicer, on the ground that “absent special circumstances a loan transaction is at
20 arms-length and no duties arise from the loan transaction outside of those in the agreement”)
21 (internal quotations omitted). Moreover, the relevant case law supports the conclusion that a
22 lender has no duty to inform a borrower whether he or she can afford a loan. Perlas v. GMAC
23 Mortgage, LLC, 187 Cal.App.4th 429, 436 (2010) (“[a] lender is under no duty to determine
24 the borrower’s ability to repay the loan The lender’s efforts to determine the
25 creditworthiness and ability to repay by a borrower are for the lender’s protection, not the
26 borrower’s.”) (internal quotations omitted); Cross v. Downey Savings and Loan Ass’n, 2009

27
28 ³ Plaintiff does not distinguish between her “negligence” and “negligence per se” theories.

1 WL 481482, at *5 (C.D. Cal. Feb. 23, 2009) (dismissing fraud claim where “defendant had no
2 duty to disclose to plaintiff that he did not have the ability to repay the loan”) (internal citation
3 omitted); Coyotzi v Countrywide Fin. Corp., 2009 WL 2985497, at *12 (E.D. Cal. Sept. 16,
4 2009) (“Lenders lack[] a duty to advise plaintiffs that plaintiffs could not make their monthly
5 payments.”) (internal quotations omitted).

6 As indicated, Plaintiff fails to allege any facts describing her relationship with
7 Defendant, much less facts showing “special circumstances” between the parties that would
8 give rise to Defendant’s alleged duty of care. Plaintiff has not argued otherwise in her
9 opposition. Therefore, Defendant’s motion to dismiss Plaintiff’s second claim for
10 negligence/negligence per se is GRANTED, and Plaintiff is granted leave to cure these
11 deficiencies.

12 **C. PLAINTIFF’S THIRD CLAIM FOR COMMON LAW FRAUD**

13 To state a claim for fraud, a plaintiff must allege: (1) misrepresentation of a material
14 fact; (2) knowledge of falsity (or “scienter”); (3) intent to defraud; (4) justifiable reliance on the
15 misrepresentation; and (5) resulting damage. Lazar v. Sup. Ct., 12 Cal.4th 631, 638 (1996).
16 Defendant asserts that Plaintiff’s fraud claim should be dismissed because she has not alleged a
17 misrepresentation of material fact made by Defendant.

18 Indeed, Plaintiff makes allegations only against undefined “Agents et al” in support of
19 her fraud claim. See Compl. at 27 (“When the Agents made the representations alleged herein,
20 he/she/it had no reasonable ground for believing them to be true.”); (“Agent made
21 misrepresentations with intention of inducing Petitioner to act in reliance”); (Agent et al
22 facilitated, aided and abetted various Agents in their negligent misrepresentation”)(“As a
23 proximate result of the negligent misrepresentations of Agents as herein alleged, the Petitioner
24 sustained damages”). Plaintiff’s fraud claim lacks any allegation of specific wrongdoing by
25 Defendant, as required by the heightened pleading standard of Rule 9(b) of the Federal Rules
26
27
28

of Civil Procedure.⁴ Furthermore, Plaintiff does not allege what facts Defendant misrepresented with respect to her loan.

In her opposition, Plaintiff asserts that she has plead her fraud claim with particularity because “Defendant charged false fees,” and Defendant “has committed fraud by representing to the court that BANK OF AMERICA, NA is a real party in interest in the contract of sale and has standing to take said property from defendant (sic) when no such claim exists.” Dkt. 19 at 2-3. Regardless of whether those factual allegations are sufficient to state a fraud claim, none of those allegations appear *in her Complaint*. Therefore, Defendant’s motion to dismiss Plaintiff’s fraud claim is GRANTED. Plaintiff is granted leave to amend her claim to conform with Rule 9(b).

D. PLAINTIFF’S FOURTH CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiff’s fourth cause of action is for breach of the implied covenant of good faith and fair dealing, which provides that no party to a contract may do anything that would deprive another party of the benefits of the contract. Foley v. Interactive Data Corp., 47 Cal.3d 654, 683-684 (1988). “This covenant is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract’s purpose.” Wolf v. Walt Disney Pictures & Television, 162 Cal.App.4th 1107, 1120 (2008) (internal quotations omitted). “The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation” and there “is no obligation to deal fairly or in good faith absent an existing contract.” Racine & Laramie, Ltd. v. Dep’t of Parks & Recreation, 11 Cal.App.4th 1026, 1031-32 (1992) (internal quotations omitted).

In her claim, Plaintiff alleges that Defendant:

willfully breached [its] implied covenant of good faith and fair dealing with Petitioner when Defendant[]: (1) Failed to provide all of the proper disclosures;

⁴ Rule 9(b) requires that Plaintiffs plead with detail “the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme.” Lancaster Com. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9th Cir. 1991). Courts have also phrased the heightened pleading standard as requiring “the who, what, when, where, and how of the misconduct charged.” Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1106 (9th Cir. 2003).

1 (2) Failed to provide accurate Right to Cancel Notices; (3) Placed Petitioner into
2 Petitioner's current loan product without regard for other more affordable
3 products; (4) Placed Petitioner into a loan without following proper underwriting
4 standards; (5) Failed to disclose to Petitioner that Petitioner was going to default
5 because of the loan being unaffordable; (6) Failed to perform valid and/or
6 properly documented substitutions and assignments so that Petitioner could
ascertain Petitioner rights and duties; and (7) Failed to respond in good faith to
Petitioner's request for documentation for servicing of Petitioner's loan and the
existence and content of relevant documents.

7 Compl. at 28-29.

8 As an initial matter, Plaintiff fails to identify which "disclosures" are at issue or what
9 particular contract, if any, forms the basis of her implied covenant claim. As explained above,
10 Plaintiff fundamentally fails to explain her relationship with Defendant, or Defendant's role in
11 her loan transaction. The lack of such allegations contravenes the Supreme Court's mandate
12 that the pleadings "give the defendant fair notice of what ... the claim is and the grounds upon
13 which it rests." Erickson, 551 U.S. at 93 (internal quotations omitted). Nevertheless, if the
14 contract underlying the instant claim is Plaintiff's mortgage loan, the alleged withholding of
15 disclosures appears to have occurred *prior to* its execution. Pre-contract conduct, however,
16 cannot support a claim for breach of the implied covenant of good faith and fair dealing. See
17 McClain v. Octagon Plaza, LLC, 159 Cal.App.4th 784, 799 (2008) (alleged misconduct during
18 contract negotiations failed to state a claim for breach of the implied covenant of good faith
19 and fair dealing).

20 Furthermore, to the extent Plaintiff's allegations can be construed as referring to events
21 that occurred *after* execution of her loan, the implied covenant does not apply if there is "no
22 express term ... on which to hinge an implied duty, and where there has been compliance with
23 the contract's express terms." Berger v. Home Depot U.S.A., Inc., 476 F. Supp. 2d 1174, 1177
24 (C.D. Cal. 2007). Again, Plaintiff fails to allege what contract forms the basis of her claim, nor
25 does she allege what specific contractual provision Defendant has violated. Furthermore,
26 Plaintiff fails to allege any express term of her mortgage loan upon which she can "hinge" the
27 implied duties that she alleges Defendant breached. As with several of her other claims,
28 Plaintiff has offered no argument in her opposition to support her implied covenant claim.

1 Accordingly, Defendant's motion to dismiss Plaintiff's claim for breach of the implied
2 covenant of good faith and fair dealing is GRANTED. Plaintiff is granted leave to cure the
3 above-stated deficiencies.

4 **E. PLAINTIFF'S FIFTH CLAIM ALLEGING TILA VIOLATION**

5 In her Complaint, Plaintiff alleges, by "incorporating by reference" her previously
6 stated allegations, that Defendant violated TILA. Compl. at 29. Plaintiff seeks both damages
7 and rescission with her claim.

8 TILA provides a one-year statute of limitations for claims for civil damages. 15 U.S.C.
9 § 1640(e). The statute begins to run when the borrower signs the loan documents, which in this
10 case, was on March 15, 2007. See Meyer v. Ameriquest Mortgage Co., 342 F.3d 899, 902 (9th
11 Cir. 2003); King v. California, 784 F.2d 910, 914 (9th Cir. 1986); RJN Ex. C. Plaintiff did not
12 commence this action until August 11, 2010, more than three years after she signed her loan
13 document. As such, her claim for damages under TILA as pled is time barred.

14 Furthermore, to the extent that Plaintiff seeks rescission, her TILA claim as pled is
15 barred by the three-year statute of limitations. 15 U.S.C. § 1635(f) ("[a]n obligor's right of
16 rescission shall expire three years after the date of consummation of the transaction"). The
17 "date of consummation" of the transaction is the date on which the loan is signed. 12 C.F.R. §
18 226.2(a)(13); Maguca v. Aurora Loan Servs., 2009 WL 3467750, *1 (C.D. Cal. Oct. 28, 2009)
19 (dismissing TILA recession claim with prejudice where plaintiff entered into the mortgage
20 agreements on April 5, 2006 and filed suit on April 14, 2009). As set forth above, Plaintiff did
21 not file her Complaint until August 11, 2010, more than three years after signing her loan.

22 Thus, Defendant's motion to dismiss Plaintiff's TILA claim is GRANTED. However,
23 the Court will grant Plaintiff leave to amend in the event that she can allege facts sufficient to
24 toll the statute.

25 **F. PLAINTIFF'S SIXTH CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL**
26 **DISTRESS**

27 To state a claim for intentional infliction of emotional distress, a plaintiff must allege:
28 (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless

1 disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or
2 extreme emotional distress; and (3) actual and proximate causation of the emotional distress by
3 the defendant's outrageous conduct. Cervantes v. J.C. Penny, 24 Cal.3d. 579, 593 (1979). To
4 be actionable, the conduct at issue must be "so extreme as to exceed all bounds of that usually
5 tolerated in a civilized community." Davidson v. City of Westminster, 32 Cal.3d 197, 185
6 (1982) (citing Cervantes, 24 Cal.3d at 593).

7 Here, Plaintiff's claim falls short. She only alleges that "[t]he conduct committed by
8 Defendants [sic], driven as it was by profit at the expense of increasingly highly leveraged and
9 vulnerable customers ... was extreme and outrageous and not to be tolerated by civilized
10 society." Compl. at 30. Plaintiff does not identify the "conduct" of Defendant that is at issue,
11 or specifically how that conduct was extreme or outrageous. Such legal conclusions without
12 factual support are insufficient. See Twombly, 550 U.S. at 555 ("[A] Plaintiffs' obligation to
13 provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions,
14 and a formulaic recitation of the elements of a cause of action will not do."). Defendant's
15 motion to dismiss Plaintiff's claim for intentional infliction of emotional distress is
16 GRANTED. Plaintiff is granted leave to cure the deficiencies in her claim.

17 **IV. PLAINTIFF'S MOTION FOR RULE 11 SANCTIONS**

18 Along with her opposition to Defendant's Motion to Dismiss, Plaintiff has filed a
19 Motion for Rule 11 Sanctions, asking the Court to "impose sanctions against David S. Reidy,
20 esq., and Molly A. Taylor, esq. counsel for Defendant ... for filing Defendants (sic) Answer in
21 violation of Federal Rule of Civil Procedure 11(b)." Dkt. 20.

22 Because Defendant has not yet answered Plaintiff's complaint, the Court liberally
23 construes Plaintiff's motion as directed to Defendant's Motion to Dismiss. Generally, Plaintiff
24 alleges that Defendant's counsel failed to make a reasonable inquiry into the facts or law before
25 filing Defendant's motion. Id. at 11. Furthermore, Plaintiff contends that Defendant's motion
26 was filed for an improper purpose, such as to harass, cause unnecessary delay, or needlessly
27 increase the cost of litigation. The record does not support Plaintiff's assertions, as there is no
28 evidence that Defendant's successful Motion to Dismiss was filed for any improper purpose.

Moreover, Plaintiff's motion is procedurally infirm, which provides an additional ground for denial. Where, as here, sanctions are sought by a Rule 11 motion, Rule 11 provides for a mandatory twenty-one day safe-harbor period before a motion for sanctions can be filed with the Court. Fed. R. Civ. P. 11(c)(1)(A). The movant must "serve the allegedly offending party with a filing-ready motion as notice that it plans to seek sanctions." Truesdell v. Southern California Permanente Medical Group, 293 F.3d 1146, 1151-1152 (9th Cir. 2002). "After 21 days, if the offending party has not withdrawn the filing, the movant may file the Rule 11 motion with the court." Id. There is no indication that Plaintiff complied with Rule 11's safe harbor provision. Indeed, Defendant's counsel has submitted a declaration indicating that an Electronic Case Filing ("ECF") email notification, sent via the ECF system, was the only notice Defendant received regarding Plaintiff's motion. Dkt. 24, Taylor Decl. ¶ 2. For these reasons, Plaintiff's Motion for Rule 11 Sanctions is DENIED.

V. CONCLUSION

For the above stated reasons,

IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Dismiss is GRANTED, with leave to amend, as to Plaintiff's first claim for breach of fiduciary duty, second claim for negligence/negligence per se, third claim for common law fraud, fourth claim for breach of the implied covenant of good faith and fair dealing, fifth claim for violation of TILA, and sixth claim for intentional infliction of emotional distress.

2. Plaintiff's Motion for Rule 11 Sanctions is DENIED.

3. The hearing on Defendant's Motion to Dismiss scheduled for November 9, 2010 is VACATED.

4. Plaintiff shall file a First Amended Complaint consistent with this Order within twenty-one (21) days of the date this Order is filed. Failure to timely file a First Amended Complaint will result in the dismissal of this action, with prejudice. If Plaintiff timely amends her pleading, Defendant shall respond consistent with the Federal Rules of Civil Procedure.

1 5. The telephonic Case Management Conference scheduled for November 17, 2010
2 is CONTINUED to **February 10, 2011 at 3:15 p.m.** The parties shall meet and confer prior to
3 the conference and shall prepare a joint Case Management Conference Statement which shall
4 be filed no later than ten (10) days prior to the Case Management Conference that complies
5 with the Standing Order for All Judges of the Northern District of California and the Standing
6 Order of this Court. Plaintiff shall be responsible for filing the statement as well as for
7 arranging the conference call. All parties shall be on the line and shall call (510) 637-3559 at
8 the above indicated date and time.

9 6. This Order terminates Dockets 15 and 20.

10 IT IS SO ORDERED.

11 Dated: 11/1/10


SAUNDRA BROWN ARMSTRONG
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 LAMESHA ROBERTSON,

5 Plaintiff,

6 v.

7 BANK OF AMERICA NA et al,

8 Defendant.
9 _____/

10 Case Number: CV10-03525 SBA

11 **CERTIFICATE OF SERVICE**

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on November 2, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
16 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
17 located in the Clerk's office.

18 Lamesha Robertson
19 1215 HollyBurne Avenue
20 Menlo Park, CA 94025

21 Dated: November 2, 2010

22 Richard W. Wieking, Clerk
23 By: LISA R CLARK, Deputy Clerk
24
25
26
27
28